No. 85-1225

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

DONALD F. BAKER,

Petitioner,

v.

HENRY WADE, DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS, IN HIS OFFICIAL CAPACITY; AND LEE HOLT, CITY ATTORNEY OF DALLAS, TEXAS, IN HIS OFFICIAL CAPACITY; AND THE CLASS OF ALL CITY, COUNTY AND DISTRICT ATTORNEYS IN THE STATE OF TEXAS, IN THEIR OFFICIAL CAPACITIES,

AND

DANNY E. HILL, 47TH DISTRICT ATTORNEY,

Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS.

	PAGE
TABLE OF AUTHORITIES	i
ARGUMENT	1
I. THIS COURT'S DECISION IN *BENDER* v. *WILLIAMSPORT AREA SCHOOL DISTRICT* STRONGLY SUPPORTS SUMMARILY VACATING THE JUDGMENT OF THE COURT BELOW AND REMANDING WITH INSTRUCTIONS TO DISMISS THE APPEAL FOR WANT OF JURISDICTION	1
II. THE INTERESTS OF FEDERALISM LIKEWISE MANDATE THAT HILL'S APPEAL TO THE FIFTH CIRCUIT BE DISMISSED .	6
III. A DECISION TO VACATE THE FIFTH CIRCUIT'S JUDGMENT WOULD OBVIATE ANY NEED TO REVIEW THE DISTRICT COURT'S RULINGS ON STANDING OR THE MERITS	8
CONCLUSION	10

TABLE OF AUTHORITIES

Cases:

Allen v. *Bd. of Education*, 392 U.S. 236 (1968) ..	5
Bender v. *Williamsport Area School District*, No. 84-773 (March 25, 1986)	*passim*
Connick v. *Myers*, 461 U.S. 138 (1983)	8
Doe v. *Bolton*, 410 U.S. 179 (1973)	9, 10

PAGE

Doe v. *Commonwealth's Attorney*, 403 F.Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976) 10

Ellis v. *Dyson*, 421 U.S. 426 (1975) 9, 10

Kentucky v. *Graham*, 105 S.Ct. 3099 (1985) 2

Lake Carriers' Ass'n v. *MacMullan*, 406 U.S. 498 (1972) 10

Linda R.S. v. *Richard D.*, 410 U.S. 614 (1973) .. 5

Los Angeles v. *Lyons*, 461 U.S. 95 (1983) 9

Steffel v. *Thompson*, 415 U.S. 452 (1974) 9

Washington v. *Seattle School District No. 1*, 458 U.S. 457 (1982) 6

Constitutional Provisions:

U.S. Constitution, Fourteenth Amendment 9

Statutes:

Texas Penal Code § 21.06 ..... *passim*

Rules:

Supreme Court Rule 22.1 8

Supreme Court Rule 34.6 8

Miscellaneous:

Jurisdictional Statement in *Doe* v. *Commonwealth's Attorney*, No. 75-896, 425 U.S. 901 (1976) 10

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In *Bender* v. *Williamsport Area School District*, No. 84-773 (March 25, 1986), this Court held that a federal court of appeals

was without jurisdiction to hear an appeal in a § 1983 suit brought against school board members in their official capacities, where the school board had declined to press the appeal after losing in the district court and the jurisdiction of the appellate court had been invoked only by a single, dissenting member of the school board.

A group of students had sued the Williamsport Area School District and the nine members of its school board in their "official capacities," seeking declaratory and injunctive relief for alleged violations of the students' constitutional rights. Slip Op. 2. The district court entered judgment for the plaintiffs and the School District declined to appeal. *Id.* at 4. John Youngman, a member of the school board and "the lone dissenter in a decision by the other eight members . . . to forego an appeal," *id.* at 9, filed a notice of appeal. *Id.* at 4, 5.

Without dissent,[1] this Court held that, "[a]s a member of the School Board sued in his official capacity, Mr. Youngman has no personal stake in the outcome of the litigation and therefore did not have standing to file the notice of appeal." Slip Op. 9. An "'official-capacity suit is . . . to be treated as a suit against the entity,'" *id.* (quoting *Kentucky* v. *Graham*, 105 S.Ct. 3099, 3105 (1985)), and since the entity in question, the school board, had chosen not to appeal an adverse decision, "Mr. Youngman's status as a School Board member [did] not permit him to 'step into the shoes of the Board' and invoke *its* right to appeal." Slip Op. 9 (emphasis added).

That logic is equally dispositive of this case. In *Williamsport*, Youngman "participated in th[e underlying] lawsuit only as a member of the [defendant] school board, sued in his official

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[1] The dissenting opinions argued only that a decision on the merits of the appeal was in order on the separate ground, irrelevant here, that Mr. Youngman had standing to appeal because of his status as a parent of children enrolled in the school district. *See* Slip Op. 1-2 (Burger, C.J., dissenting); *id.* at 1 (Powell, J., dissenting).

capacity. The *real party in interest* in that lawsuit was the board." Slip Op. 1 (Marshall, J., concurring) (emphasis added). In the case at hand, Danny Hill did not even participate in the underlying lawsuit: he was merely one member of the defendant class of all city, county and district attorneys in Texas, all of whom were sued solely in their official capacities. Despite notice from the class representative even before the defendant class was certified (23a n.1, 88a n.3), Hill declined to take any part in the proceedings until after the conclusion of trial and the entry of judgment. (88a & n.3). Hill's attempt to intervene more than six months after the entry of judgment was denied by the district court and Hill was adjudicated to be unfit to represent the interests of the State of Texas and the defendant class. (111a).[2] And the "real party in interest" in this case is undeniably the State of Texas, since it is an enactment of that sovereign entity — and not of Hill's bailiwick, Potter County, nor of Danny Hill himself — that has been challenged as unconstitutional. Once the State of Texas declined to appeal from the district court's holding of unconstitutionality,[3] the case was over: "[t]here was nothing left to litigate." Slip Op. 1 (Marshall, J., concurring).

Indeed, Danny Hill's lack of standing to appeal is even clearer in this case than was board member John Youngman's in *Williamsport*. Youngman, although the "lone dissenter" from the board's decision not to appeal, Slip Op. 9, was at least

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[2] The latter ruling has never been overturned. *See* Baker's Petition at 6-7 & nn.13, 14, 15. As this Court noted in *Williamsport*, it "is particularly important to observe the [procedural] requirements [for intervention] in cases in which the interest of the litigant seeking to appeal diverges from the interest of the party to the suit." Slip Op. 13 n.9. Of particular relevance in this regard are the district court's conclusive findings (1) that Danny Hill was not an adequate representative of the interests of the State of Texas, and (2) that Hill had failed to show that he was not simply a passive front for a private group with its own ax to grind. (87a & n.2, 90a & n.8, 111a, 112a).

[3] The representatives of the defendant class, the City and District Attorneys of Dallas, also decided not to appeal. (89a).

a co-equal member of a collegial body who might under some circumstances be able to complain that his vote had been diluted or rendered nugatory under state law. *Id.* at 10 n.7.[4] But in that event his relief would lie not in arrogating to himself the public entity's right to appeal, but in "a mandamus or like remedy against the Secretary of the School Board." *Id.* In stark contrast, the legal hierarchy of the State of Texas is not "collegial," and Danny Hill is by no means the equal of the Texas Attorney General, who has exercised his prerogative to decide that appealing the district court judgment in this case is not in the best interests of the state. In objecting to that decision, Hill is the "lone dissenter" among 1,085 city, county and district attorneys, and if the law provides him any "remedy" against the Attorney General's decision, it must also lie in a state court action for mandamus. Hill attempted to compel the Attorney General to prosecute an appeal in this case by just that means, and was rebuffed by the Supreme Court of Texas. (89a n.7).[5]

The fact that Hill is charged with directly enforcing the law cannot distinguish him from the school board member who sought to appeal in *Bender* v. *Williamsport*.[6] The only way that Hill can avoid dismissal of his appeal under *Williamsport* is by proving that he and the other local prosecutors whom he purports to represent — none of whom has seen fit to join Hill's crusade — have cognizable interests of their own, distinct from that of the State of Texas, in appealing a judgment

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[4] Of course, "[g]enerally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take." Slip Op. 9-10.

[5] *See* Baker's Petition at 6 n.10.

[6] The outcome in *Williamsport* would have been the same if the students had been barred by some Eleventh Amendment-like principle from suing the school board itself for denying them the use of school rooms for their religious activities, and had instead sued the teachers and janitors whose duty it was to patrol the halls and classrooms to stop impermissible prayer meetings. Surely such employees could not override a school board decision to accept rather than appeal the district court's ruling that the meetings must be permitted.

that simply enjoins them from enforcing the *state* statute invalidated by the district court.[7] This he cannot do.

First, Hill was sued only in his official capacity as a local prosecutor charged with enforcing *state* laws; in that role, he cannot have any interest in this case distinct from that of the State of Texas in seeing the state's criminal laws enforced.[8] After all, in his individual capacity, Hill has absolutely no "judicially cognizable interest in the prosecution or non-prosecution of another." *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973). Second, although Hill has devoted much space to repeating that he purports to represent the interests of the defendant class of local prosecutors, *not* the interests of the State of Texas,[9] his profuse filings provide not one word explaining *how*, as District Attorney of Potter County, he has any cognizable interest in enforcing § 21.06 that is distinct from the interest of Texas and its Attorney General in seeing the state's criminal laws enforced. Indeed, Hill expressly concedes that, with respect to § 21.06, his *only* duty is that of "'enforcing the statute *in the interests of the state and not simply in the interest of the locality where he serves.*'"[10] And Hill further concedes that, on the question of his standing to appeal, "[t]he *en banc* opinion itself expressly holds that Hill is 'a proper official under Texas law to *represent the state.*'"[11]

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[7] Hill has never alleged such an interest. And, of course, in order to provide an alternative ground for standing to appeal, such a separately cognizable interest "must affirmatively appear in the record." *Williamsport*, Slip Op. 11.

[8] Hill has not alleged — nor could he — that either obeying the injunction of the district court or living with the Attorney General's decision not to appeal compels him to violate his oath as a district attorney. *Cf. Allen* v. *Bd. of Education*, 392 U.S. 236, 241 n.5 (1968); *see Williamsport, supra*, Slip Op. 10 n.7. Indeed, there is a radical inconsistency between Hill's supposed interest in dissolving the injunction against enforcing the Texas sodomy law against Baker, and Hill's claim that Baker is at no risk of prosecution under that law. *See* Part III., *infra*.

[9] *See, e.g.*, Cross-Petition in No. 85-1512 at 9.

[10] Cross-Petition in No. 85-1512 at 18 (citations omitted) (emphasis added).

[11] *Id.* at 17 n.20 (citations omitted) (emphasis added).

Third, Hill has not mentioned any local governmental interest distinct from those that were considered and rejected by the Attorney General in deciding not to pursue an appeal.[12] Nor has Hill alleged the existence of any circumstance unique to Potter County that requires the enforcement there of a law which the State of Texas has decided it can do without.[13]

Therefore, on the strength of *Bender* v. *Williamsport*, this Court should summarily vacate the *en banc* decision of the Fifth Circuit and remand with instructions to dismiss Danny Hill's appeal for lack of jurisdiction.

II. THE INTERESTS OF FEDERALISM LIKEWISE MANDATE THAT HILL'S APPEAL TO THE FIFTH CIRCUIT BE DISMISSED.

The facts of this case present an even more compelling rationale for vacating the judgment below than did the situation this Court evaluated in *Bender* v. *Williamsport*. By entertaining the appeal of a dissident board member in *Williamsport*, the Third Circuit committed an error to which no one — including the school board — objected, until this Court itself noticed the problem after granting certiorari. Slip Op. 5. But here the

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[12] Most of Hill's general "health and safety" evidence, *see, e.g.*, Brief in Opposition at 22-24, was considered and rejected by the district court. *See* Appendix D. Hill's statement that "the Fifth Circuit's reliance on this evidence should be sustained," Brief in Opposition at 22, completely misrepresents the decision below. Even a quick glance at the Fifth Circuit's five-page opinion, Appendix A, and its three-page order denying rehearing, Appendix F, reveals that the court below never even *considered* health or safety as a justification for § 21.06. Indeed, in his Cross-Petition in No. 85-1512 at 27-28, Hill felt it necessary to present some sort of belated motion to this Court that this material somehow be retroactively deemed part of the record.

[13] Indeed, the district court expressly noted that there was no evidence of any such special circumstance. (89a n.5). This is not a case where local government has challenged, under the federal Constitution, a state decision to override a local policy choice. *Cf. Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982).

Fifth Circuit[14] took jurisdiction of Hill's appeal over the vigorous objections both of Petitioner Baker and of the State of Texas. Because the relevant public entity in this case is not merely a local school board but a *sovereign state*, and because the objections to a disgruntled official's renegade appeal that the court below ignored were voiced not by a school superintendent but *by the state itself*, this case implicates fundamental issues of federalism that were absent in *Williamsport*.

By its unprecedented judicial sponsorship of Danny Hill, the Fifth Circuit has inverted a legal hierarchy assembled by the people of Texas in their constitution and by the legislature of Texas in its statutes. Neither Hill nor the court below offers a clue as to where that court derived its authority to empower a single local prosecutor to dictate litigation strategy and legal policy to the entire state, and to expose the Texas treasury to further liability for attorneys' fees — all in direct contravention of the express objections of the state's designated chief legal officer. The all too real threat that this frightening innovation poses to state legal structures throughout the nation is underscored by the filing in this case of a brief *amicus curiae* joined by half the States in the Union. For Danny Hill nonetheless to insist that "federal-state relations are not at issue,"[15] and that this case involves "merely a matter of Texas state law regarding which state officers may represent themselves in a federal forum,"[16] is to display gross insensitivity to the legitimate concerns and sovereign prerogatives of the several states.

In this respect, pages 9-12 of the Brief in Opposition — wherein Hill launches an intemperate assault on the character and motives of Attorney General Jim Mattox — are quite re-

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[14] This was the decision of the Fifth Circuit sitting *en banc*. *See* Appendix A. The prior panel of the Fifth Circuit threw out Hill's appeal, holding that the Attorney General's decision not to appeal concluded the matter. *See* Appendix E at 128a-132a.

[15] Hill's Brief in Opposition in No. 85-1251 at 7.

[16] Hill's Brief in Opposition in No. 85-1225 at 6.

vealing, although otherwise they offer nothing that warrants this Court's attention.[17] Hill's emphasis on this material suggests that his real "interest" is in venting his violent displeasure with what he perceives to be the Attorney General's political views, and that his real ground for pressing this appeal may be nothing more than "an attempt to turn that displeasure into a cause célèbre." *Connick* v. *Myers*, 461 U.S. 138, 148 (1983). One need not contest Hill's right to criticize the decisions of Texas' public officials to recognize that his unseemly crusade against the Attorney General of Texas is hardly an adequate basis for the Fifth Circuit's decision to assert jurisdiction over a case which properly terminated when the real party in interest, the State of Texas, declined to appeal.

III. A DECISION TO VACATE THE FIFTH CIRCUIT'S JUDGMENT WOULD OBVIATE ANY NEED TO REVIEW THE DISTRICT COURT'S RULINGS ON STANDING OR THE MERITS.

Application of the principles enunciated in *Williamsport* would dispose of this case in its entirety and relieve the Court of any need to review the district court's judgment[18] — much less to consider still further submissions of the sort with which Hill has persisted in burdening this Court. It nonetheless seems appropriate to stress that Hill's own claimed interest in lifting

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[17] Of course, the Court may wish to consider whether the inclusion of the material on these pages merits sanctions, and whether it should be stricken as "burdensome, irrelevant, immaterial, and scandalous matter," pursuant to Supreme Court Rules 22.1 and 34.6.

[18] Vacating the judgment below and requiring dismissal of Hill's appeal would, of course, reinstate the judgment of the district court without any opportunity for this Court to review either the district court's jurisdiction over the matter or its ruling on the merits. But that fact need not detain this Court any more here than it did in *Williamsport*, where the identical course of action reinstated a trial court judgment that this Court never reviewed.

the district court's injunction barring enforcement of § 21.06 against Petitioner Baker only reenforces the findings of both courts below that Baker has a clear and concrete stake in the outcome of this case.

Hill attempts to cloud Baker's standing to challenge § 21.06 by invoking a wholly inapposite line of cases. In relying on *Steffel* v. *Thompson*, 415 U.S. 452 (1974), and *Los Angeles* v. *Lyons*, 461 U.S. 95 (1983), Hill conveniently overlooks the fact that those cases involved statutes or government policies that applied with an even hand to *all* members of the public.[19] In contrast, as Hill himself notes,[20] § 21.06 *targets* the particular sexual conduct in which Don Baker and other homosexuals seek to engage.[21] Indeed, it is undisputed that Baker has engaged in the past, and wishes to engage in the future, in precisely the acts proscribed by § 21.06.

This case is therefore governed by the standing analysis of such cases as *Doe* v. *Bolton*, 410 U.S. 179, 188-89 (1973), and

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[19] "*Steffel* concerned a general trespass ordinance that did not, on its face, apply particularly to activities in which Steffel engaged or sought to engage." *Ellis* v. *Dyson*, 421 U.S. 426, 447 (1975) (Powell, J., dissenting). *Lyons* concerned a police choke-hold policy that was potentially implicated in *every* encounter between police and the public, not just in confrontations with the police in which Lyons alleged that he engaged, or was likely to engage in the future.

[20] Far from denying that § 21.06 singles out the intimate practices of homosexuals, Hill believes this to be the law's greatest virtue. *See, e.g.*, Cross-Petition in 85-1512 at 24-26.

[21] Of course, nothing in this standing analysis depends upon viewing the target group as a "suspect class" in assessing the case on its merits. In this regard, Petitioner notes that in the Brief in Opposition at 20-21, Hill does battle with a "suspect class" argument that Petitioner has never advanced. Meanwhile, Hill neglects to oppose in any way Petitioner's equal protection argument that § 21.06 is unconstitutional because it criminalizes, solely on the basis of the gender of the accused, conduct otherwise legal in Texas. *See* Baker's Petition at 26-27. Moreover, Hill apparently concedes in its entirety Petitioner's contention that the decision below must be reversed because the Fifth Circuit failed to apply even the minimum rationality test, let alone a more rigorous standard of scrutiny, in reviewing § 21.06 under the Liberty Clause of the Fourteenth Amendment. *See* Baker's Petition at 24-25, 27-29.

Lake Carriers' Ass'n v. *MacMullan*, 406 U.S. 498, 506-08 (1972), where this Court "found constitutional challenges to state and federal statutes justiciable despite the absence of actual threats of enforcement directed *personally* to the plaintiff." *Ellis* v. *Dyson*, 421 U.S. 426, 447 (1975) (Powell, J., dissenting) (emphasis added). For example, physicians who wished to perform abortions were found to have standing to challenge a Georgia abortion law in *Doe* v. *Bolton* on the ground that the "physician is the one against whom these criminal statutes directly operate," 410 U.S. at 188, even though "the record does not disclose that any one of them has been prosecuted, or threatened with prosecution," *id.* Baker's standing is even clearer than that of the *Doe* physicians, for the district court here found that the threat of prosecution to Baker was "credible and real" (69a)[22] — a finding upheld by the Fifth Circuit *en banc*. (2a).

CONCLUSION

For the foregoing reasons, the Court should summarily vacate the judgment below and remand the case with instructions to dismiss the appeal for want of jurisdiction.

Respectfully submitted,

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[22] In contrast, the plaintiff in *Doe* v. *Commonwealth's Attorney*, 403 F.Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. U.S. 901 (1976), alleged only that his awareness of the Virginia sodomy law had a "chilling effect" on his social life, *see* Jurisdictional Statement in *Doe*, No. 75-896 at 4.